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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RICE L. HOWARD, Plaintiff/Counterdefendant/ Appellant, v. BARRY RAMER and TRISHA LOVE RAMER, husband and wife, Defendants/Counterclaimants/ Appellees.	2 CA-CV 2009-0172 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20081985

Honorable Virginia C. Kelly, Judge

AFFIRMED

Law Offices of Carl D. Macpherson
By Carl D. Macpherson
Tucson
Attorney for Plaintiff/
Counterdefendant/Appellant

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Counterclaimants/Appellees

E C K E R S T R O M, Presiding Judge.

¶1 This action arises from a disputed real property transaction between the appellant, Rice Howard, and the appellees, Barry and Trisha Ramer. After finding the parties had executed a settlement agreement relating to the property, the trial court granted the Ramers' motion for summary judgment and entered judgment in their favor. On appeal, Howard claims material questions of fact exist as to whether the settlement agreement should be enforced. We affirm the judgment.

Factual and Procedural Background

¶2 "In reviewing a grant of summary judgment, we view the facts and the reasonable inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered." *Diaz v. Phoenix Lubrication Serv., Inc.*, 581 Ariz. Adv. Rep. 32, ¶ 10 (Ct. App. May 4, 2010).[1] The disputed property originally was owned by Trisha Ramer's brother, Don Love. Before his death, Love recorded a deed to the property making Howard a joint tenant with a right of survivorship. After Love's death,

[1]In his opening brief, Howard has failed to provide any citation to the record on appeal as required by Rule 13(a)(4), (6), Ariz. R. Civ. App. P. Instead, he has attached as appendices to his brief copies of certain documents labeled "exhibits," and he has cited to these arbitrarily numbered "exhibits" to support his factual assertions. Although Rule 13(a)(8) allows an appellant to attach an appendix to an opening brief, reference to an appendix does not substitute for proper citation to the record on appeal as it is numbered pursuant to Rule 11(a)(2), Ariz. R. Civ. App. P. Moreover, Howard does not tell us whether the documents attached to his brief are included in the record on appeal. We therefore will not consider these items. *See In re Property at 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 11, 64 P.3d 843, 846-47 (App. 2003) (materials attached to brief not incorporated into record on appeal); *Lewis v. Oliver*, 178 Ariz. 330, 338, 873 P.2d 668, 676 (App. 1993) (court considers only record on appeal).

Howard conveyed an interest in the property to the Ramers, making them joint tenants with him. The property was then sold in 2005 for a profit of approximately $600,000. Proceeds from the sale were placed in a joint bank account held by Howard and the Ramers. Howard had withdrawn about $19,000 from the account before the funds were depleted.

¶3 In 2008, Howard filed a complaint against the Ramers that, as later amended, alleged claims of "constructive trust" and fraud. In essence, he claimed the Ramers had made false representations in order to obtain their interest in the property, his grant to them was unsupported by any consideration, and therefore he was entitled to receive all proceeds from the sale of the property through a constructive trust. He also alleged fraud based on the Ramers' having "wrongfully assume[d] control of the [sale] proceeds."

¶4 The Ramers filed an answer and counterclaim alleging, *inter alia*, that they had executed a settlement agreement with Howard regarding the property in September 2007. Pursuant to the settlement agreement, Howard received a promissory note from the Ramers in the principal sum of 214,686.89 Canadian dollars plus interest at an annual rate of nine percent. By the terms of the agreement, the Ramers' assignment of the promissory note served as "full and complete compensation for all monies owed to" Howard by the Ramers. The Ramers therefore sought relief against Howard for breach of contract, arguing he violated their settlement agreement by demanding the sale proceeds and bringing the present action.

¶5 In his answer to the counterclaim, Howard asserted "lack of consideration" as his only affirmative defense. He did not dispute the existence or terms of the settlement agreement, and he later acknowledged that he had been receiving interest payments under the promissory note.[2] After the Ramers moved for summary judgment on Howard's claims, he asserted in his opposition that he had been "coerced" into executing the settlement agreement "[a]s a result of substantial and life threatening medical issues."[3] Upon reviewing the medical records offered to support this defense, the trial court determined that Howard had produced evidence he was suffering from some memory loss at the time of the agreement, but his memory loss did not support an inference that he had been coerced or defrauded. The court found there was no evidence of duress at the time the agreement was executed and, consequently, there was no factual

[2]In a display of poor pleading practice, counsel for Howard stated that the portion of the counterclaim concerning the terms of the settlement agreement "would speak for itself." He expressly refused to admit or deny any other paragraphs relating to the settlement, instead stating he "would leave [the Ramers] to their proofs." Such answers do not comply with Rule 8(b), Ariz. R. Civ. P., which requires parties to "admit or deny the averments upon which the adverse party relies" or otherwise specify that a lack of information or knowledge prevents a response.

[3]The trial court noted that Howard raised this defense for the first time in his opposition to the motion for summary judgment. Although a party may amend an answer after a motion for summary judgment has been filed, an amendment is not permitted when it would result in prejudice to another party, as with raising new issues. *See Sirek v. Fairfield Snowbowl, Inc.*, 166 Ariz. 183, 184-85, 186, 800 P.2d 1291, 1292-93, 1294 (App. 1990); *see also* Ariz. R. Civ. P. 8(c), 12(b), 12(h) (failure to assert duress defense properly results in waiver). In fact, Howard never formally moved to amend his answer to include a "coercion" defense. Yet the Ramers did not object to these procedural irregularities below. Because the court acknowledged the "coercion" defense in its summary judgment ruling, we regard Howard's answer as having been amended implicitly by the court.

issue to resolve by trial. The court therefore granted summary judgment in favor of the Ramers on both of Howard's claims.

¶6 The Ramers then moved for partial summary judgment on their counterclaim. Howard stipulated to the entry of summary judgment on the Ramers' breach of contract claim, and the remaining counts in their counterclaim were dismissed voluntarily. After entry of final judgment, this appeal followed.

Discussion

¶7 On appeal, Howard contends (1) the settlement agreement was "based upon inadequate consideration" and (2) he was a vulnerable adult within the meaning of A.R.S. § 46-456 and therefore entitled to the full proceeds from the property's sale. The Ramers assert that Howard has waived these arguments by failing to raise them below. We agree. *See McDowell Mountain Ranch Land Coal. v. Vizcaino*, 190 Ariz. 1, 5, 945 P.2d 312, 316 (1997) (holding parties may not raise argument for first time on appeal); *Webber v. Grindle Audio Prods., Inc.*, 204 Ariz. 84, ¶ 26, 60 P.3d 224, 230 (App. 2002) ("[I]t is settled that an appeal is not the appropriate place to consider issues or theories not presented below.").

¶8 Howard never raised a claim, defense, or argument regarding § 46-456 to the trial court. And, although he asserted the defense of "lack of consideration" in his answer, Howard did not challenge the adequacy of consideration supporting the settlement agreement before that court. The existence of consideration and its adequacy are distinct legal issues. *See Carroll v. Lee*, 148 Ariz. 10, 13, 712 P.2d 923, 926 (1986)

("Any performance which is bargained for is consideration, and courts do not ordinarily inquire into the adequacy of consideration.") (citation omitted); 17 C.J.S. *Contracts* § 131 (2009) ("The existence of consideration for a contract must be distinguished from the question of its value."). Here, Howard admitted in his memorandum in opposition to the Ramers' summary judgment motion that he had received consideration for executing the settlement agreement, and the court therefore did not address that issue in its ruling. We will not address the adequacy of the consideration supporting the settlement agreement for the first time on appeal.

Disposition

¶9 The trial court's judgment is affirmed. We grant the Ramers' request for attorney fees on appeal pursuant to A.R.S. § 12-341.01 upon their compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge